No. 85-693 (8)

In the Supreme Court
OF THE
United States

October Term 1985

ASAHI METAL INDUSTRY CO., LTD.
Petitioner,

VS.

SUPERIOR COURT OF CALIFORNIA IN AND FOR THE COUNTY OF SOLANO (CHENG SHIN RUBBER INDUSTRIAL CO., LTD., REAL PARTY IN INTEREST)

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

PETITIONER'S BRIEF

GRAYDON S. STARING
Counsel of Record
RICHARD D. HOFFMAN
Two Embarcadero Center,
Suite 2600
San Francisco, CA 94111
Tele: (415) 984-8200
Attorneys for Petitioner

LILLICK MCHOSE & CHARLES
Of Counsel

BOWNE OF SAN FRANCISCO, INC. • 190 NINTH ST. • S.F., CA 94103 • (415) 864-2300

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QUESTIONS PRESENTED

Where a Taiwanese manufacturer marketing its products world-wide contracts for component parts overseas from a Japanese manufacturer which does not engage in any business activity in California, or in the United States, and sues the Japanese manufacturer in a California court for indemnity on account of the settlement of a California product liability tort claim against the Taiwanese manufacturer:

1. Is the mere awareness of the Japanese manufacturer that a substantial number of the Taiwanese manufacturer's finished products are sold in California adequate to establish the requisite contacts giving the California court personal jurisdiction over it?

2. Is the requisite interest of the State of California established by the declared intention of the California Supreme Court to apply California law to the relationship and transactions of the two alien manufacturers and by the assertion of a consequent interest in the orderly administration of California laws?

PARTIES TO THE PROCEEDING

All parties to the proceeding in the Supreme Court of the State of California are named in the caption.

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OPINIONS BELOW

The Superior Court's order is unreported and is reproduced in Appendix A to the Petition. The decision of the Court of Appeal of the State of California was originally reported at 149 Cal.App.3d 30, 194 Cal.Rptr. 741, but was subsequently decertified for publication when the Supreme Court of California granted a petition for hearing, and is reproduced in Appendix B to the Petition. The opinion of the California Supreme Court and dissenting opinion are reported at 39 Cal.3d 35, 216 Cal.Rptr. 385, and reproduced in Appendix C to the Petition.

JURISDICTION

By a final order of July 25, 1985 entered the same date, the Supreme Court of the State of California denied Petitioner's Petition for Writ of Mandate directing the Superior Court for the County of Solano, State of California, to quash summons and complaint served on Petitioner and discharged an alternative writ which had previously been issued by the Court of Appeal of the State of California, First Appellate District. The jurisdiction of this Court was invoked pursuant to 28 U.S.C. § 1257(3) by a petition filed within 90 days thereafter and granted March 3, 1986.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

California Code of Civil Procedure section 410.10 states:

> A court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States.

The provision of the United States Constitution involved is the Due Process Clause of the Fourteenth Amendment:

> Section 1 . . . nor shall any State deprive any person of life, liberty, or property, without due process of law; . . .

STATEMENT OF THE CASE

A California resident was killed and another injured in a motorcyle accident in California. The accident was allegedly caused by a sudden loss of air and explosion in the rear tire of the motorcycle [Pet. App. C-1].

In consequence a products liability action was filed in California alleging that the motorcycle tire, tube and sealant were defective. The complaint named Cheng Shin Rubber Industrial Co., Ltd. (Cheng Shin), the Taiwanese manufacturer of the tube, and other defendants. Asahi Metal Industry Co., Ltd. (Asahi) was not named as a defendant by the California plaintiff [Pet. App. B-1]. Cheng Shin, in turn, filed a cross-complaint seeking

indemnity from various of its co-defendants and also from Asahi, the Japanese manufacturer of the tube's valve assembly whom Cheng Shin brought in as a third party [Pet. App. C-1-2]. The case against Cheng Shin and the other defendants was settled and dismissed, leaving Cheng Shin's third party action for indemnity [Pet. App. C-16, fn. 9].

The third party action asserted claims on various grounds, including breach of implied and express warranties and disparity of faults, and sought full indemnity or contribution (called equitable indemnity in California),[1] presumably under California law. Asahi moved to quash service of summons but the Superior Court denied the motion and asserted jurisdiction over Asahi for the indemnity claims of Cheng Shin [Pet. App. A].

The Court of Appeal of the State of California then issued a writ of mandate ordering the Superior Court to quash service of summons and complaint on Asahi. The Court of Appeal, relying upon this Court's decision in *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980), and the California Supreme

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[1] "If plaintiffs are successful in their complaint against cross-complainant, any settlement or judgment thereby would result from the active and primary negligent conduct, the breach of implied and express warranties to cross-complainant, strict liability or other misconduct of cross-defendants, and each of them, or by virtue of the disparity of fault as between cross-complainant and cross-defendants, and each of them, and the passive, secondary and negative negligence and/or other misconduct of cross-complainant, if any there was. Therefore, cross-complainant is entitled to indemnification from cross-defendants, and each of them, by the implied right of indemnification, by right of indemnification, by operation of law or a right of equitable indemnification. . . ." Cross-Complaint, First Cause of Action, Para. VII.

. . .

"Cross-complainant's negligence or other breach of duty, if any there was, is comparatively less than the culpable conduct of cross-defendants, and each of them; therefore cross-complainant is entitled to equitable apportionment from cross-defendants, and each of them, bu [sic] reason of their wrongful conduct. . . ." Cross-Complaint, Second Cause of Action, Para. II.

Court's decision in *Secrest Machine Corp. v. Superior Court*, 33 Cal. 3d 664 (1983), concluded that Asahi could not reasonably be required to respond to an indemnity claim in California and that the exercise of jurisdiction by a California court would be unfair and unreasonable [Pet. App. B-5-6].

The Supreme Court of California then granted a hearing and reversed the decision of the Court of Appeal, concluding that California could exercise jurisdiction against Asahi for the indemnity claims of Cheng Shin because "the minimum contacts requirement is satisfied where, as here, the manufacturer is aware that a substantial number of its products will be sold in the forum state" [Pet. App. C-15].

The following facts are those relied on or acknowledged by the Court of Appeal and the Supreme Court of California in reaching their decisions.

Asahi is a Japanese corporation. It has no offices, property or agents in California. It solicits no business and makes no sales there [Pet. App. C-10]. It maintains no spare parts and gives no advice on maintenance, sales, or use in California. It does not advertise in California. It has conducted no deliberate economic acts to serve the tire market in California [Pet. App. B-3]. In short, it does not do business in California.

Asahi manufactures valves for tires. Asahi has from time to time in the last ten years sold tire valves for use on motorcycle tire tubes to Cheng Shin in Taiwan and to other alien corporations. Between 1978 and 1982 Asahi sold 1,350,000 valve stem assemblies to Cheng Shin. Sales of tire valves to Cheng Shin in Taiwan in 1981 accounted for 1.24 percent of Asahi's total income for that year. Sales of tire valves to Cheng Shin in Taiwan in 1982 accounted for 0.44 percent of Asahi's total income for 1982 [Pet. App. C-2]. All of the sales of tire valve assemblies to Cheng Shin occurred in Taiwan. All of the shipments were sent from Japan to Taiwan [Pet. App. B-2].

Asahi is not Cheng Shin's exclusive supplier of valve assemblies. Cheng Shin purchases valve assemblies from other suppliers and markets its finished products throughout the world. Tubes sold in California (and presumably the United States) are

marketed by Cheng Shin through a related company, Cheng Shin Tire USA, Inc., a California corporation. Cheng Shin states that approximately 20% of its total United States sales (an unknown number) are in California [Pet. App. B-2-3].

Asahi "did not design or control the system of distribution that carried its valve assemblies into California" [Pet. App. C-11]. Asahi knew, however, that Cheng Shin sold its tubes throughout the world, including the United States, having acquired this knowledge from Cheng Shin. Thus Asahi was aware of the probability that some of the tire valve assemblies it sold to Cheng Shin in Taiwan would end up in California [Pet. App. C-10, fn. 4].

Cheng Shin has also relied upon a declaration of one of its lawyers, referred to in both opinions below, as to the number of Asahi valves found on tubes of other manufacturers in a certain store in California [Pet. App. B-3 and C-2, fn. 1]. If his identifications were correct, nevertheless the facts are not connected to the argument in this case by any record that Asahi was aware of the destination of the valves he counted.

SUMMARY OF ARGUMENT

I. A. This case presents a question of the reasonable assertion of a State's sovereign power over citizens and residents of foreign sovereign states and its answer must consider the extent to which foreign sovereigns will accept and enforce the State's judgments.

I. B. Jurisdiction over non-residents is determined by general principles imposed by the Due Process Clause. Those principles are that the defendant must have meaningful "contacts, ties or relations" with the forum; that there be "some act by which the defendant purposefully avails itself of the privilege of conducting activity within the forum state, thus invoking the benefits and protections of its laws"; that the suit not offend "traditional notions of fair play and substantial justice"; and, in the case of "specific jurisdiction", that the inquiry focus upon the "relationship among the defendant, the forum and the litigation".

I. C. Under the general principles a number of tests have been recognized by the Court which are applicable to the circumstances here. In combination, they provide criteria for determining when a State can impose its laws on nonresident aliens. (1) The alien must conduct activity within the State, thus seeking benefits of its laws beyond the privilege of being sued there. (2) The unilateral activity of another is not enough. (3) The alien's acts should reasonably lead it to anticipate suit there. (4) To found jurisdiction, a contract must have a substantial connection with the State. (5) One who delivers products into the "stream of commerce" expecting them to be purchased in the State may be sued there for their defects. (6) But mere foreseeability is not sufficient to support jurisdiction. (7) The additional requirement of fair play and substantial justice involves the burden on the defendant, the plaintiff's interest in obtaining relief and the State's interest in the dispute, which cannot be established by its desire to apply its own law or to secure the welfare of its residents where there are alternative reasonable means at hand.

I. D. International law acts as a limitation on a State's power to exercise jurisdiction. Under international law, which is a part of our law, the enforcement of foreign judgments is a matter of comity and therefore a matter of discretion depending upon a variety of circumstances. The general principles governing jurisdiction have been developed mainly in interstate cases and must be applied with due consideration for differences in the international setting, where our Constitution cannot also control reception and enforcement.

II. A. The claim here is for indemnity, in part explicitly on contractual grounds, which must ultimately rest on the ground that Asahi did not furnish what was expected in a sales transaction. For the purpose of jurisdictional analysis, the transaction involved may be classified under the standards of Western law as contractual.

II. B. In contract cases the Court has focused especially on the contract's connection with the State, the extent of purposeful activity in the State and the anticipation of litigation there. When this case is compared with others, it is seen that the contract does not have a substantial connection with California, there is no

purposeful activity by Asahi in California, and there is nothing to support the conclusion that Asahi should have anticipated being haled into a California court.

II. C. If this case is viewed as a product liability case, application of the "stream of commerce" theory of jurisdiction to the facts does not afford a basis for California to assert jurisdiction over Asahi. The Court, in *World-Wide Volkswagen v. Woodson*, rested the doctrine on a foundation of conduct by which the defendant "purposefully avails itself of the privilege of conducting activities within the forum State"; it has no application here where no such purpose is shown. Asahi has not attempted, directly or indirectly, to engage in the economic activity which would make it fair and unburdensome to litigate in California. The California Supreme Court thought awareness of sales in the forum State sufficient. But this Court has held that foreseeability is not enough, explaining that purposeful activity leading to the reasonable anticipation of litigation in the forum State is required. Foreseeability by itself is merely a vision of the future, judicially implanted in the corporate mind, and neither an activity in nor contact with the forum State. Likewise, the unilateral activity of another, here the Taiwanese manufacturer, is not a contact of Asahi with the forum State. Thus Asahi does not have the necessary minimum contacts and would not have such contacts even if the injured California plaintiffs were bringing suit against it.

II. D. Even if sufficient minimum contacts existed, the exercise of jurisdiction still must not offend traditional notions of fair play and substantial justice. The applicable tests are (1) burden on the defendant, (2) interest of the plaintiff and (3) the forum State's interest in the dispute. While the obvious burden to the Far Eastern defendant of litigating in California must be weighed against a plaintiff's interest, no such interest was shown by the record or recognized as a factor by the California Supreme Court. Its notion that the State must pursue its interest in consumer protection by the application of California law to transactions between a Taiwanese and a Japanese ignores that consumers are protected by the exercise of jurisdiction over those who manufacture, import and sell finished products. The California Supreme

Court found supplemental interests of California in the administration of its laws and a possibility of inconsistent verdicts, again assuming the application of its own law and a consequent interest in the verdict as to Asahi. The application of California law here would itself violate due process. But choice of law should not have been reached at this point, as a finding of State interest for jurisdictional purposes cannot be based upon the choice of forum State law.

III. This case does not measure up to the well-known general principles. The supposed contact, tie or relationship of Asahi with California here was much less substantial than the contacts found insufficient in past cases and inadequate to suggest under any available standard that they should have led a Japanese corporation in the circumstances to expect it could be subjected to jurisdiction in California. The assertion of that jurisdiction does not accord Asahi fair play and substantial justice, having regard to the burden upon the defendant, the opportunity of the Far Eastern plaintiff to sue in its own hemisphere, and the inappropriateness of applying California law or choosing a California court to administer Far Eastern law. Neither Asahi nor the litigation over a foreign transaction has a meaningful relationship to the forum. The relationships of defendant, litigation and forum are therefore too attentuated to sustain jurisdiction. The assertion of jurisdiction on such an attentuated basis is likely to produce judgments which overstep the boundaries of international credibility and result in futility and illusion.

ARGUMENT

I.

WELL SETTLED BASIC PRINCIPLES AND PARTICULAR TESTS ARE APPLICABLE HERE WITH DUE REGARD TO THE DISTINCTION BETWEEN DOMESTIC AND INTERNATIONAL CASES

A. The case concerns the reasonable extent of a State's power over an alien in its own foreign country

The broad question presented by this case is the extent to which a State can impose its laws and process upon an alien not present here. It concerns the sovereign reach of a member State of this union, not to grasp the resident of another State, but to grasp an alien over the higher "sovereignty barrier"[2] of its own foreign sovereign nation. By asserting jurisdiction the State is claiming the right to make a binding determination of the legal quality of an alien defendant's conduct abroad. The question is therefore what is a reasonable assertion of authority of members of a community of sovereign nations beyond their borders. If the answer is to be realistic rather than pretentious, some account must be taken of what judgments, and especially default judgments,[3] other nations, in the exercise of their own sovereignties, will recognize as reasonable and thus accept and enforce.[4] Specifically, to what extent will foreign sovereigns accept and enforce

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[2] See *Insurance Co. of North America v. Marina Salina Cruz*, 649 F.2d 1266, 1272 (9th Cir. 1981); *Pacific Atlantic Trading Co. v. M/V Main Express*, 758 F.2d 1325, 1330 (9th Cir. 1985).

[3] The ultimate compulsion and relevant standards relate to default judgments. The distinction is significant because of national doctrines such as that expressed in the Restatement of Conflict of Laws, Second, § 96, under which a judgment may be enforced only because the defendant appeared abroad for the purpose of contesting personal jurisdiction and lost the point. See *York v. Texas*, 137 U.S. 15 (1890).

[4] "Even though an extranational judgment may have satisfied the standards of forum law, it will in general be denied recognition if it fails to comply with the jurisdictional requirements of its own law." Ehrenzweig, Conflict of Laws 164 (1962).

the determination by a State that it can regulate persons outside its territory?

B. The principles governing jurisdiction are well settled

The defendant may not be subjected to binding judgments of a forum with which it has not established sufficient or meaningful "contacts, ties, or relations". *International Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945); *Shaffer v. Heitner*, 433 U.S. 186, 213 (1977); *Burger King Corp. v. Rudzewicz*, ____ U.S. ____, 85 L. Ed. 2d 528, 540 (1985). Those contacts must also be such that the maintenance of the suit against the absent defendant not offend "traditional notions of fair play and substantial justice". *International Shoe Co. v. Washington, supra*, at 316; *World-Wide Volkswagen Corp. v. Woodson, supra*, at 292; *Shaffer v. Heitner, supra*, at 207. In more concrete terms the Court has always emphasized that the requisite contacts cannot stem from the unilateral activity of those who claim some relationship with a nonresident defendant and that there must, rather, be "some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Hanson v. Denckla*, 357 U.S. 235, 253 (1958); *Kulko v. Superior Court*, 436 U.S. 84, 93-94 (1978); *Burger King Corp. v. Rudzewicz, supra*, at 542. These

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"Since, except for constitutional compulsion, this concept of international or interstate jurisdiction is one determined under the law of each forum rather than under the law of the rendering court or under a superlaw, it seems appropriate to examine the problem from the standpoint of the recognizing court itself, instead of speaking in absolute terms of the existence of such jurisdiction in the rendering court. [footnote omitted]", *Id.* 206.

"As between nations, ideas of 'jurisdiction in the international sense' determine whether one nation will recognize another's assertion of judicial power. 'Can the island of Tobago pass a law to bind the rights of the whole world?' asked Lord Ellenborough in the famous case of *Buchanan v. Rucker*, 9 East 192, 103 Eng. Rep. 546 (K.B. 1808). He answered his rhetorical question with another question, 'Would the world submit to such an assumed jurisdiction?' " Cramton, Currie and Kay, Conflict of Laws, 521-22 (1981).

See also Scoles and Hay, Conflict of Laws 259-60 (1984).

principles govern all assertions of jurisdiction, whether general or specific.

No claim is made that Asahi is subject to general jurisdiction in California. The question is therefore limited to the existence of "specific jurisdiction" and the inquiry for the necessary "contacts, ties or relations" therefore focuses more narrowly upon the "relationship among the defendant, the forum and the litigation". *Shaffer v. Heitner, supra*, at 204; *Rush v. Savchuk*, 444 U.S. 320, 327 (1980); *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 775 (1984); *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 (1984).

C. The particular criteria for testing jurisdiction in the circumstances here have been generally agreed

In addition to the requirement of purposeful activity by the defendant in the forum state, rather than any unilateral activity of another, the Court has formulated a number of other particular tests to be applied to the facts in a variety of cases, some of which have more, and some less, application to particular circumstances. The following are all those which are applicable in examining the circumstances of the present case. All have been repeatedly stated and appear from various cases to be unanimously recognized, although the views of the Justices have differed in their application.

1. "[I]t is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws."[5] It is inherent in the logic of this statement that the necessary "act" not be an event so remote from the protection of the State that the defendant could reasonably be thought to seek no other benefit or protection than the dismissal of the suit against him.

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[5] *Hanson v. Denckla, supra*, at 253; *Burger King Corp. v. Rudzewicz, supra*, at 542; *see also Shaffer v. Heitner, supra*, at 216; *Kulko v. Superior Court, supra*. at 94.

2. "The unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State."[6]

3. The defendant's conduct and connection with the forum State must be such that the defendant "should reasonably anticipate being haled into court there."[7]

4. To support jurisdiction, a contract must have a "substantial connection" with the forum State.[8]

5. The forum State may exercise "personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State" where the suit arises from a defect in those products.[9]

6. But mere foreseeability of causing injury in the forum State is not a "sufficient benchmark for personal jurisdiction"; "the foreseeability that is critical to due process analysis . . . is that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there."[10]

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[6]*Hanson v. Denckla, supra*, at 253; *Kulko v. Superior Court, supra*, at 93-94; *World-Wide Volkswagen Corp. v. Woodson, supra*, at 298; *Burger King Corp. v. Rudzewicz, supra*, at 542.

[7]*World-Wide Volkswagen Corp. v. Woodson, supra*, at 297; *see also Shaffer v. Heitner, supra*, at 216; *Kulko v. Superior Court, supra*, at 97-98; *Keeton v. Hustler Magazine, Inc., supra*, at 781; *Calder v. Jones*, 465 U.S. 783, 790 (1984).

[8]*McGee v. International Life Insurance Co.*, 355 U.S. 220, 223 (1957); *Hanson v. Denckla, supra*, at 252, 253; *Burger King Corp. v. Rudzewicz, supra*. at 545; *cf. Shaffer v. Heitner, supra*, at 213.

[9]*World-Wide Volkswagen Corp. v. Woodson, supra*, at 298; *Burger King Corp. v. Rudzewicz, supra*, at 541.

[10]*World-Wide Volkswagen Corp. v. Woodson, supra*, at 295-97; *Burger King Corp. v. Rudzewicz, supra*, at 542.

7. Where sufficient contacts with the forum State are found, the requirement of "fair play and substantial justice"[11] involves "the burden on the defendant", "the plaintiff's interest in obtaining convenient and effective relief," and "the forum State's interest in adjudicating the dispute".[12] But the fact that the forum State may desire to apply its law to the case, or even the fact that its law is obviously likely to apply, apart from an explicit choice by the parties, is not a factor in establishing the legitimate interest of the State in asserting jurisdiction.[13] And the State's interest in securing the welfare or compensation of its residents is not sufficient to justify the burdens on a nonresident defendant when the State has other reasonable means at hand to secure those objectives.[14]

D. International standards are a further constraint on a State's power to exercise jurisdiction in an international case

International law "in its widest and most comprehensive sense . . . is part of our law".[15] Therefore the enforcement of judgments of the courts of another nation is a matter of "the comity of nations",[16] a recognition allowed with due regard to "international

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[11]*International Shoe Co. v. Washington, supra*, at 320.

[12]*World-Wide Volkswagen Corp. v. Woodson, supra*, at 292; *Burger King Corp. v. Rudzewicz, supra*, at 543. Additional factors have been cited which are not relevant to international cases.

[13]*See Hanson v. Denckla, supra*, at 254; *Shaffer v. Heitner, supra*, at 216; *Kulko v. Superior Court, supra*, at 98; *Keeton v. Hustler Magazine, Inc., supra*, at 778; *Burger King Corp. v. Rudzewicz, supra*, at 546-47.

[14]*See Kulko v. Superior Court, supra*, at 98.

[15]*Hilton v. Guyot*, 159 U.S. 113, 163 (1895). It is also part of the law of California. "International law is a part of our law and as such is the law of all States of the Union." *Skiriotes v. Florida*, 313 U.S. 69, 72-73 (1941).

[16]"No law has any effect, of its own force, beyond the limits of the sovereignty from which its authority is derived. The extent to which the law of one nation, as put in force within its territory, whether by executive order, by legislative act, or by judical decree, shall be allowed to operate within the dominion of another nation, depends upon what

duty and convenience".[17] The Court, in *Hilton v. Guyot, supra*, at 164, quoting Justice Story,[18] pointed out that the exercise of comity "is, and ever must be, uncertain [and] that it must necessarily depend on a variety of circumstances" . It went on to cite numerous cases illustrating how various nations might or might not recognize and enforce foreign judgments in varying circumstances, before providing in its own judgment an example, by granting only a limited recognition of the French judgment before it.

Courts and legal writers have collected abundant authority on the reluctance of nations to grant indiscriminate credit to foreign judgments without regard to their own views of minimum standards of justice.[19] The disregard of those considerations leads, at home, to the delusion of plaintiffs who believe that a default judgment here will be a thing of value and tends abroad to make our judgments suspect of pretension. In stressing the significance of enforcement abroad we do not contend that jurisdiction in a particular case depends on the attitude of the nation where the

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our greatest jurists have been content to call 'the comity of nations.' " 159 U.S. at 163.

[17]" 'Comity,' in the legal sense, is neither a matter of absolute obligation on the one hand, nor of mere courtesy and good will upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws." 159 U.S. at 163-64.

[18]Story, Commentaries on the Conflict of Laws, § 28 (1834)

[19] *See generally, Hilton v. Guyot, supra*; von Mehren & Trautman, "Recognition of Foreign Adjudications: A Survey and a Suggested Approach", 81 Harv. L. Rev. 1601 (1968). We discount extreme views of non-recognition such as those of The Netherlands, *id.* 1602, or of France, *id.* 1613. Important and accessible examples, however, are found in systems close to our own, such as in England, see Stone, "The Recognition and Enforcement in England of Foreign, Personal and Proprietary Judgments" (1983) 4 Lloyds Maritime & Commercial Law Quarterly 1, 10-13, and Canada, see authorities collected in Scoles & Hay, Conflict of Laws, 260, n. 6 (1984).

judgment in that case will need to be enforced. What we do urge is that the assertion of power must show a respectful regard for conservative and reasonable views of national power which are current among others in our international community.

The general principles by which a State's power to regulate conduct outside its borders is to be determined have been developed mainly in the setting of relations between the member states of our federal union. In the domestic setting the Full Faith and Credit Clause is an important factor and our Constitution, as interpreted by this Court, controls both ends of the axis of power, that is, not only the right of a forum State to assert power but the duty of another State to accede to it and enforce it.[20] The Court has referred to the roots of the domestic standards in our constitutional history and the historic view that "the Nation was to be a common market". *World-Wide Volkswagen Corp. v. Woodson, supra*, at 293. In only a few instances, however, has this Court had to consider the problem of State power in the international setting, where, although the Full Faith and Credit Clause is not involved, the Due Process Clause of either the Fifth Amendment or the Fourteenth Amendment remains central.[21] The general principles under the Due Process Clause have been laid down by the Court principally in interstate cases. They are also applicable in international cases, with appropriate consideration for the circumstance that the Constitution does not control the obligation of a foreign sovereign to accept and enforce another sovereign's questionable exercise of power. *See* von Mehren and Trautman, *Recognition of Foreign Adjudications: A Survey and a Suggested Approach*, 81 Harv. L. Rev. 1601, 1608-10 (1968).

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[20] "In the United States, federal limitations on state adjudicatory power afford an opportunity, unavailable at the international level, for a rational allocation of judicial business among the several states." Cramton, Currie and Kay, Conflict of Laws, 522.

[21] The Due Process Clause of the Fourteenth Amendment is applicable here because State action is involved. Nevertheless, because the assertion of jurisdiction here is international, rather than interstate, the limits encountered would be the same for a State court and a Federal court and the scope of the two clauses in this setting should be identical.

II.

THE JURISDICTION ASSERTED BY CALIFORNIA CONFLICTS WITH THE ACCEPTED CONSTITUTIONAL TESTS

A. The substance of this case is a foreign relationship governed by foreign contract relations under foreign law

This case involves a supply or sales contract and the rights and duties provided in it or arising out of it under governing laws of which we are ignorant, presumably those of Taiwan or Japan. As we do not know those laws nor how they would characterize the transaction, it is appropriate, for the preliminary purpose of jurisdictional analysis here and without any particulars in the record, to characterize the transaction in the terms of Western law. [22]

Although the case has its roots in a casualty in California, claimed to be due to a defective tire tube, Asahi did not sell the tube, either at retail or wholesale, ship it here or even manufacture it. This is solely a claim for indemnity by Cheng Shin, contending that the failure of the tube it manufactured was due to a failure of the component valve made by Asahi. The claim is based in part explicitly upon the contractual ground of breach of warranty. It is, therefore, a claim that Asahi failed to furnish the valve it undertook and was expected to furnish. Additional grounds are asserted which must also take account of any relevant contractual relationships.[23]

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[22] *See* Cal. Evid. Code § 311(a) and *Perkins v. Benguet Consolidated Mining Co.*, 55 Cal. App. 2d 720, 768 (1942).

[23] If it were supposed that the matter were to be governed in part by California tort law, then it should be noted that even claims for indemnity under California tort law are presumably subject to limitations arising from the contracts of the parties, as indemnity in California arises either from contract or from "equitable considerations" and is dependent upon a special relationship of the parties. *City and County of San Francisco v. Ho Sing*, 51 Cal. 2d 127, 130 (1958).

B. The foreign transaction and relationship with which this case is concerned do not pass the tests applied by the Court in analogous contract cases

In its four most recent decisions on personal jurisdiction involving contracts and resultant relationships, the Court has focused especially on three tests:

(1) Substantiality of the contract's connection with the forum State;[24]

(2) Purposeful activity within the State invoking the benefits and protections of its laws;[25]

(3) Anticipation of being haled into the State's courts;[26]

Where jurisdiction has been upheld, one party to the contract was domiciled in the forum State, as is certainly not the situation here. *McGee v. International Life Insurance Co., supra, Burger King Corp. v. Rudzewicz, supra.* In *Hanson v. Denckla, supra,* at 253, the Court rejected the argument that Florida's legal view of the execution of a power of appointment as republishing a Delaware trust agreement in Florida could establish a sufficient connection with the contract. And in *Shaffer*, the Court did not regard as sufficient the contractual relationships of stockholder, director and officer with a corporation domiciled in the forum State. In this case there is no connection at all between the contract and California.

As for purposeful activity, the record surely shows less of it by Asahi in the forum State than by the directors and shareholders of the Delaware corporation in *Shaffer,* and less even than by the father who sent his daughter to live most of the year in the forum

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[24] *McGee v. International Life Ins. Co., supra,* at 223; *Hanson v. Denckla, supra,* at 252, 253; *Burger King Corp. v. Rudzewicz, supra, at* 545; *cf. Shaffer v. Heitner, supra,* at 213.

[25] *Hanson v. Denckla, supra,* at 253; *Shaffer v. Heitner, supra,* at 216; *Burger King Corp. v. Rudzewicz, supra,* at 547; *cf. McGee v. International Life Ins. Co., supra,* at 223.

[26] *Shaffer v. Heitner, supra,* at 216; *Burger King Corp. v. Rudzewicz, supra,* at 547; *cf. McGee v. International Life Ins. Co., supra,* at 223.

State in *Kulko*. And Asahi displayed no more such purposeful activity than the automobile dealer in *World-Wide Volkswagen*, where the Court acknowledged it was foreseeable that the car would roll over the nation's highway system onto the roads of Oklahoma but held that fact not adequate to justify the exercise of jurisdiction.

If the shareholders and directors, the father, and the automobile dealer should not have anticipated being haled into the courts of the forum States in the cases just cited, there is nothing in the record of this case which plausibly suggests that Asahi should have reasonably anticipated being haled into a California court.

C. The facts here also fail the additional tests which would apply to a product liability tort claim

In *World-Wide Volkswagen*, the Court recognized that not everyone who manufactures or sells a product which injures someone in a forum State has the necessary contacts, ties or relations with that State to be sued there on account of the injury. The Court said, however, in a dictum much discussed since, that the forum State does not exceed its powers "if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State" [at 297-98]. This statement appears as part of a paragraph explaining conduct by which the defendant "purposefully avails itself of the privilege of conducting activities within the forum State."[27]

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[27]"When a corporation 'purposefully avails itself of the privilege of conducting activities within the forum State," *Hanson v. Denckla*, 357 U.S. at 253, it has clear notice that it is subject to suit there, and can act to alleviate the risk of burdensome litigation by procuring insurance, passing the expected costs on to customers, or, if the risks are too great, severing its connection with the State. Hence if the sale of a product of a manufacturer or distributor such as Audi or Volkswagen is not simply an isolated occurrence, but arises from the efforts of the manufacturer or distributor to serve, directly or indirectly, the market for its product in other States, it is not unreasonable to subject it to suit in one of those States if its allegedly defective merchandise has there been the source of injury to its owner or to others. The forum State does not exceed its powers under the Due Process Clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State. *Cf. Gray v. American Radiator & Standard Sanitary Corp.*, 22 Ill.2d 432, 176 N.E.2d 761 (1961)." 444 U.S. at 297-98.

Although the California Supreme Court and other courts as well have applied the dictum mechanically to find jurisidiction wherever a sale of goods into any commercial pattern ultimately leads to their resale in the forum State, the reasonable understanding of the matter is that delivery into the "stream of commerce" cannot be interpreted so broadly as to omit the element of purposefully availing oneself of the privilege of conducting activities in the forum State. Of course, the manufacturer who directly sells its product in the forum State is engaging in a purposeful activity there. The justification of the "stream of commerce" gloss is a defendant's practice of being active indirectly. This appears earlier in the same paragraph where the Court expresses what must have been the same idea as the "stream of commerce" theory in other words by saying that the assertion of jurisdiction is not unreasonable when the sale in the forum State arises from "the efforts of the [defendant] manufacturer or distributor to serve, directly or indirectly, the market for its product" there [at 297].

At the end of the same paragraph (quoted in note 27, *supra*), the court cited for comparison *Gray v. American Radiator & Standard Sanitary Corp.*, 22 Ill.2d 432, 176 N.E.2d 761 (1961), a case concerned with the manufacturer of a component part. This arouses speculation as to whether the Court meant to affirm that decision, as some lower courts including the Supreme Court of California have thought, or just to acknowledge the case as the leading source of the "stream of commerce" theory.[28] Promptly afterward, in *Eschmann Bros. & Walsh, Ltd. v. Mueller & Co.*,

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[28]*Gray* was taken in *Oswalt v. Scripto, Inc.*, 616 F.2d 191, 201-02 (5th Cir. 1980) to have been fully approved by this Court, and that conclusion was evidently rejected in *Humble v. Toyota Motor Co.*, 727 F.2d 709 (8th Cir. 1984). See also the speculative questions on the relationship of *Gray* and *World-Wide Volkswagen* in Cramton, Currie and Kay, Conflict of Laws, 560-61 (1981).

444 U.S. 1063 (1980), a product liability case against the foreign manufacturer of a component,[29] the Court vacated the judgment and remanded the case to the Colorado Court of Appeals for reconsideration in light of *World-Wide Volkswagen Corp.* We respectfully suggest that the Court had at that point not cited *Gray* for the purpose of embracing any more than the concept which *Gray* had expressed.

The valid reason for the "stream of commerce" doctrine then is to reach those who purposefully direct their commerce at the forum State, but would evade its jurisdiction by using an indirect channel, as through a chosen distributorship. The doctrine is premised on the belief that manufacturers should not be able to insulate themselves from jurisdiction by acting through intermediaries instead of dealing directly with the forum State.[30] The doctrine thus permits States to bring before their courts nonresidents who reasonably do anticipate being haled into court there and also those who realistically should anticipate being haled into court there.

If, as we submit, the "stream of commerce" doctrine expresses a special case of purposefully conducting activities in the forum State, then it is an abuse of that doctrine to apply it here. There is nothing to show that Asahi directs anything at the State of California or has any more purpose than to supply the Taiwanese manufacturer with such parts as it specifies to be incorporated

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[29]The defendant was the English manufacturer of a component alleged to have been defective and to have been sold to a manufacturer of medical instruments in Chicago, incorporated into an instrument and foreseeably used in the United States to the injury of the patient in Colorado [*see* Petition in No. 79-517 in this Court, a copy of which has been provided to counsel for Cheng Shin]. The case is not reported in Colorado, either before or after the decision of this Court. It was No. 78-973 in the Colorado Court of Appeals, where the record shows that after remand the Colorado court reversed the prior decision and affirmed the quashing of service by an order, copies of which have been provided to the Clerk and to counsel for Cheng Shin.

[30]*See DeJames v. Magnificence Carriers, Inc.*, 654 F.2d 280, 285 (3d Cir.), *cert. denied*, 454 U.S. 1085 (1981).

into its products, which it then directs as it wishes, with no urging or motivation from the parts supplier and no accountability to it.

The doctrine has no application to those who do not themselves market in the forum State and do not have an indirect marketing scheme to do so. Nor does it apply to those who do not deliberately design their parts with the anticipation that they will be used in the United States and do not attempt to comply with United States rules and regulations in so designing their parts, but leave those considerations to the manufacturer of the product to be marketed here. The "stream of commerce" theory of jurisdiction still requires some actual, voluntary and deliberate conduct by the nonresident defendant with the forum State.[31]

Asahi has made no attempt to exploit the California marketplace. Asahi has made no attempt to insulate itself from direct dealings with the forum State by using intermediaries. Asahi has no marketing scheme to serve California. Asahi does not deliber-

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[31]Several courts which have explicitly employed the stream-of-commerce theory of jurisdiction have recognized its limited applicability. In *Volkswagenwerk A.G. v. Klippan*, 611 P.2d 498 (Alaska), *cert. denied*, 449 U.S. 974 (1980), a German seatbelt manufacturer was held subject to Alaska jurisdiction for alleged defects in a seatbelt installed on a German Volkswagen. The seatbelt manufacturer represented by a label sewn on a seatbelt that the belt was "approved for sale in all states" and took steps to ensure that its seatbelts complied with standards established by the American Society of Automotive Engineers. Thus, the German seatbelt manufacturer deliberately designed its product in anticipation of its being widely used and marketed in American jurisdictions. Similarly, in *Rockwell International Corp. v. Costruzioni Aeronautiche Giovanni Agusta*, 553 F. Supp. 328 (E.D. Pa. 1982), a French component parts manufacturer was held subject to Pennsylvania jurisdiction where the component parts manufacturer specially designed its component parts (bearings) for use in a helicopter targeted for executive transport in the United States and Europe, knowing the contemplated use of the product; advertised in a publication widely circulated in Canada, Europe and the United States; and had an exclusive agreement with a California corporation to promote and sell its product. Therefore, actual contacts with the United States existed and there was a finding by the court that the nonresident defendant was directly attempting to exploit the market in which the injury occurred.

ately design its product so as to comply with local rules and regulations. The Court has observed that it is precisely because of engaging in economic activity in the forum State that subjecting the defendant to litigation there will not be unfairly burdensome. *McGee v. International Life Insurance Co., supra,* at 223; *Burger King Corp. v. Rudzewicz, supra,* at 541. The functions of a parts supplier in the position of Asahi do not constitute economic activity in California.

The California Supreme Court, employing the precise analysis rejected by this Court in *World-Wide Volkswagen,* and substituting awareness for foreseeability, determined "that the minimum contacts requirement is satisfied where, as here, the manufacturer is aware that a substantial number of its products will be sold in the forum State" [Pet. App. C-15]. This Court, in *World-Wide Volkswagen Corp. v. Woodson, supra,* at 295, declared that foreseeability alone was not enough and clearly held that other and substantial contacts were necessary.

> But the foreseeability that is critical to due process analysis is not the mere likelihood that a product will find its way into the forum State. Rather, it is that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there. 444 U.S. at 297.

Thus, the relevant foreseeability must be incident to other circumstances which would lead the defendant to expect that its conduct would subject it to the jurisdiction.[32] The Court elaborated the point by saying that the Due Process Clause

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[32] Ripple and Murphy, World-Wide Volkswagen Corp. v. Woodson: Reflections on the Road Ahead, 56 Notre Dame Lawyer 65, 68 (1980), express it this way: "Instead, the Court stated that foreseeability in the jurisdictional context concerns itself with whether a 'defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there.' [Footnote omitted.] These connections arise when a defendant 'purposefully avail[s]' himself of the privilege of conducting activities in the forum State. [Footnote omitted.]"

> gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit.
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> When a corporation "purposefully avails itself of the privilege of conducting activities within the forum State," . . . it has clear notice that it is subject to suit there, and can act to alleviate the risk of burdensome litigation by procuring insurance, passing the expected costs on to customers, or, if the risks are too great, severing its connection with the State. 444 U.S. at 297.

Clearly then foreseeability, a judicial construct rather than an action or contact, is not itself activity within the State or the purposeful availment of the privilege of conducting such activity. Here the sole supposed "contact" was foreseeability, assuming, what is by no means clear, that the awareness of Asahi amounts to the same thing as foreseeability. It is no contact at all and surely is not what was contemplated in *World-Wide Volkswagen* or *International Shoe* as essential to the exercise of jurisdiction.

In *World-Wide Volkswagen,* the Court reiterated the statement in *Hanson* that "unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State." [at 298]. *See also Burger King Corp. v. Rudzewicz, supra,* at 542. That statement in *Hanson* is immediately amplified by the much quoted language that "it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." 357 U.S. at 253. Asahi's component part was only located in California and sold there because Cheng Shin, through its unilateral activity, chose to market its tubes in California and purposefully availed itself of the privilege of conducting activities there. No act of Asahi occurred in California or directed its component there.[33]

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[33] Even if the California plaintiffs sued Asahi for their personal injuries there would still be no basis for the exercise of jurisdiction over Asahi. Asahi's contacts with California are the same irrespective of

D. Even if there were sufficient contacts with California the additional criterion of fair play and substantial justice would not be met

In *World-Wide Volkswagen Corp. v. Woodson, supra,* at 292, the Court summed up the recognized tests of reasonableness to meet the requirement of fair play and substantial justice where minimum contacts have been found to exist. The relevant tests applicable here are the burden on the defendant, the plaintiff's interest in obtaining convenient and effective relief, and California's interest in adjudicating the dispute.

A Far Eastern defendant is obviously burdened by litigation in California on Far Eastern contracts and transactions involving commitments and understandings in the light of Far Eastern law and custom. We recognize that the defendant's burden may be weighed against the plaintiff's interest. But there is nothing in the record here to show that it is important for Cheng Shin to obtain relief in California rather than in the Far East. Indeed, the California Supreme Court did not rely upon Cheng Shin's interest, but rather balanced the burden of Asahi only against what it saw as the interest of the State of California [Pet. App. C-15-17].

The California Supreme Court first discovered "a strong interest in protecting its consumers by ensuring that foreign manufacturers comply with the state's safety standards" [Pet. App. C-16]. By this the court clearly meant the application of California tort law to a case involving transactions between a Taiwanese and a Japanese in their own countries. But California's interest in protecting its consumers is satisfied by the ability of its laws to reach those who manufacture, import and sell the finished products in California, without reaching down through the whole chain of suppliers of components, components of components, *et cetera*. Hence no substantial California interest is protected by its exercise of jurisdiction over Asahi.

The court also found supplemental interests of California in "the orderly administration of its laws . . . where, as here, 'most of

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which party seeks to assert jurisdiction. Thus Asahi's relationship to the forum would be as attenuated as when Cheng Shin sued.

the evidence testimonial or otherwise is within its borders . . .' " and in the fact that Cheng Shin had named "numerous defendants" and "a possibility of inconsistent verdicts if Asahi cannot be sued in California" [Pet. App. C-16]. Here, again, California assumes the application of its own law in undertaking a burden of orderly administration. Its concern with inconsistent verdicts further begs the question by assuming California's interest in the verdict as to Asahi. And its assumption about the location of the evidence is unsupported by the record.

The application of forum State law to foreign defendants is limited by considerations of due process. *Home Insurance Co. v. Dick,* 281 U.S. 397 (1930); *Allstate Insurance Co. v. Hague,* 449 U.S. 302 (1981). If the question were ever properly reached in this case, the application of California law would not be found to comport with due process. *Cf. Home Insurance Co. v. Dick, supra; Phillips Petroleum Co. v. Shutts,* 472 U.S. ___, ___, 86 L. Ed. 2d 628, 646-49 (1985). In the absence of any showing to the contrary, the nature, obligation and interpretation of a contract are governed by the law of the place where it was made[34] and the Court has emphatically rejected invitations to legal jingoism in international commerce.[35]

But it was error of the California Supreme Court to reach choice of law at this point. This Court has repeatedly held that a court cannot base a finding of state interest upon a choice of forum State law, even in cases where the applicability of forum State law appeared likely. *Hanson v. Denckla, supra,* at 254; *Shaffer v. Heitner, supra,* at 216; *Kulko v. Superior Court, supra,* at 98; *Keeton v. Hustler Magazine, Inc., supra,* at 778. Accordingly the main argument made for California's interest also fails.

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[34] *Liverpool & Great Western Steam Co. v. The Phenix Insurance Co.,* 129 U.S. 397 (1889); *Hall v. Cordell,* 142 U.S. 116 (1891); *Gaston Williams & Wigmore of Canada, Ltd. v. Warner,* 260 U.S. 201 (1922); *Mutual Life Insurance Co. of New York v. Liebing,* 259 U.S. 209 (1922).

[35] *See The Bremen v. Zapata Off-Shore Co.,* 407 U.S. 1, 9 (1972); *Scherk v. Alberto-Culver Co.,* 417 U.S. 506, 517 n.11 (1974).

III.

CALIFORNIA'S ASSERTION OF JURISDICTION OVER ASAHI IS INCONSISTENT WITH GOVERNING CONSTITUTIONAL PRINCIPLES AND INTERNATIONAL STANDARDS

As we have shown above, this case does not fairly meet any of the tests the Court has laid down for the identification of minimum contacts. Viewing the case against the broad expressions of governing principles reviewed in Part I.B., *supra,* produces no different impression.

The single, supposed incident of "contact, tie or relationship" which is thought to provide a handhold for the California court here is the awareness by Asahi that some of its valves might be incorporated in products sent to California and sold there. In *Helicopteros,* contacts substantially more numerous and closer did not suffice to sustain jurisdiction. That case was analyzed as presenting a question of general, rather than specific, jurisdiction but it is remarkable how closely some of the contacts with the forum could be said to be related to the claim.[36] In *Shaffer,* which did deal with specific jurisdiction, the insufficient contacts, ties and relationships were distinctly more meaningful than in this case and more likely to indicate to defendants their amenability to jurisdiction in the State, in whose corporate creature they owned stock and had accepted offices and directorships. Nothing in the record, in past decisions of the Court, or in relevant credible literature indicates that a Japanese corporation, in the circumstances here, should reasonably suppose that it was establishing such contacts, ties or relationships with California as to be subjected to jurisdiction there.

Fair-minded persons will not regard the assertion of jurisdiction here as "fair play and substantial justice", on the basis of the obvious burden upon a Far Eastern party to defend in California in connection with Far Eastern transactions, the presumable opportunity of the Far Eastern plaintiff to sue in its own hemisphere and the inappropriateness of applying California law (or of

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[36]*See Helicopteros Nacionales de Colombia, S.A. v. Hall, supra,* dissenting opinion of Justice Brennan at 425-26.

choosing a California court to apply Japanese or Taiwanese law) to the transactions and resulting rights of the parties.[37]

Asahi is shown to have no contacts or ties giving it any meaningful relations to the forum. The litigation, depending as it does upon a completely foreign transaction, has no meaningful relationship to the forum beyond its present existence there. Although this case is circumstantially different from *Rush v. Savchuk,* 444 U.S. 320 (1980), the conclusion reached there provides a valid analogy here:

> The only affiliating circumstance offered to show a relationship among Rush [Asahi], Minnesota [California], and this lawsuit is that Rush's [Asahi's] insurance company [purchaser] does business in the State. 444 U.S. at 328.

In these circumstances the "relationship among the defendant, the forum and the litigation"[38] is too attentuated for serious regard.

Finally, the inadequacy of contacts is accentuated when we take into account the likelihood of transgressing acceptable international standards and the futility of encouraging illusory claims of power.

CONCLUSION

For the foregoing reasons we respectfully submit that the decision of the Supreme Court of California should be reversed.

Respectfully submitted,

GRAYDON S. STARING
RICHARD D. HOFFMAN
Attorneys for Petitioner

LILLICK MCHOSE & CHARLES
Of Counsel

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[37]*See World-Wide Volkswagen Corp. v. Woodson, supra,* at 292.

[38]*Shaffer v. Heitner, supra,* at 204.